THE "SINAR MAS"; FRASER & NEAVE (MALAYSIA) SDN. BHD. v. "SINAR MAS" & ORS., OWNERS OF

[O.C.J. (Mohamed Azmi J.) January 16, 1980]
[Kuala Lumpur — Admiralty Suit In Rem No. C. 113 of 1979]

Shipping Law — Arrest of sister ship — Whether wrongful — Question of Jurisdiction — Reliance on clause 17 of Bill of Lading — Meaning of "claims" therein — U.K. Administration of Justice Act, 1956, s. 3(2) & (4) — Courts of Judicature Act, 1964, s. 24(b).

The defendants, owners of the vessel "Sinar Jaya" sought to set aside the Writ *in rem* and Warrant of Arrest lodged against the said vessel by the plaintiffs. The defendants also claimed damages. The defendants were sued for $66,840.49 for breach of contract and/or negligence in respect of damage to and short delivery of the plaintiffs' goods carried by the defendants' vessel "Sinar Mas" whilst on a voyage from Penang to Kuching vide Bill of Lading No. PK-2 of October 24, 1978. "Sinar Jaya" was the sister ship of "Sinar Mas" and the former was detained under Warrant of Arrest on August 17, 1979 while lying at Port Klang.

The question for determination was whether the arrest of 'Sinar Jaya" was wrongful.

The defendants argued that the arrest was wrongful as the admiralty suit had been wrongly filed in Kuala Lumpur High Court instead of Kuching High Court as required by Clause 17 of the Bill of Lading. They contended that the Admiralty Action *In Rem* was wrongly instituted under section 3(4) of U.K. Administration of Justice Act 1956.

Held, dismissing the defendants' application: (1) a "claim" in the context of clause 17 does not amount to a litigation. There is a distinction between "claims" and "disputes". Clause 17 does not envisage any dispute on litigation. It is confined to "claims" pure and simple;

(2) Clause 17 is not a jurisdiction clause or even a forum clause. The court should not import extra words into Clause 17 so as to give it new meaning with regard to the intention of the contracting parties. As such the plaintiffs were entitled to file the writ in Kuala Lumpur High Court;

(3) even if clause 17 could be construed as a jurisdiction on forum clause, it could not be invoked in the present case;

(4) the High Courts in Borneo and States of Malaya have similar jurisdiction and adopt the same admiralty practice. A jurisdiction or forum clause does not apply to a litigation commenced in another court of similar jurisdiction and situated in the same country as the court envisaged by the parties to the contract;

(5) the plaintiffs' case does come within the ambit of section 3(4) of U.K. Administration of Justice Act, 1956.

Cases referred to:-

(1) *The Fehmarn* [1958] 1 All E.R. 333, 334.
(2) *The Adolf Warski* [1976] 1 Lloyd's Law Report 107.
(3) *The Permina* [1977] 1 M.L.J. 43, 45.
(4) *The Banco* [1971] P. 137.

(The following cases were cited but not mentioned in the judgment: *Maharani Woolen Mills Co.* v. *Anchor Line* (1927) 29 Ll.L.R. 169; *The St. Elefterio* [1957] P. 179).

ADMIRALTY SUIT.

S. Kulasegaran for the applicants/defendants.

Anantham Kasinather for the respondents/plaintiffs.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by summons-in-chambers dated September 11, 1979 by the defendants as owners of the vessel "Sinar Jaya", for an order that the Writ *in rem* in this Admiralty Suit and the Warrant of Arrest and the notice to the said vessel and all process in connection therewith be set aside. The defendants also claim damages and other ancillary reliefs.

In this case, the defendants are sued for damages amounting to $66,840.49 for breach of contract and/or negligence in respect of damage to and short delivery of the plaintiffs' goods carried by the defendants' vessel "Sinar Mas" whilst on a voyage from Penang to Kuching *vide* Bill of Lading No. PK-2 dated October 24, 1978. It is not in dispute that "Sinar Jaya" is the sister ship of "Sinar Mas", and the former was detained under warrant of arrest on August 17, 1979 while lying at Port Klang. The question for determination is whether the arrest of "Sinar Jaya" is wrongful.

Counsel for the defendants argues that the arrest is wrongful on two grounds. Firstly, this admiralty suit has been wrongly filed in Kuala Lumpur High Court instead of Kuching High Court as required by Clause 17 of the Bill of Lading. (See Exhibit 'A' annexed to the affidavit of Ng Chee Hong sworn on October 12, 1979). Secondly, this Admiralty Action In Rem is said to be wrongly instituted under section 3(4) of the United Kingdom Administration of Justice Act 1956 although the Admiralty Practice in England is applicable in Malaysia by virtue of section 24(b) of the Courts of Judicature Act, 1964.

On the first ground, the relevant part of Clause 17 reads as follows:

"Claims. Any claims that may arise hereunder must be made at the port of delivery for determination and settlement at that port only. . . ."

In *Shorter Oxford Dictionary,* "claims" means a demand for something as due; an assertion of a right to something. In my view, a claim in the context of Clause 17 does not amount to a litigation which, according to the same dictionary, means the action of carrying on a suit in law or equity; legal proceedings; and disputation. Having regard to the judgments in *The Fehmarn*[1] and *The Adolf Warski,*[2] I think there is a distinction between "claims" and "disputes". Clause 17 does not envisage any dispute on litigation. It is confined to "claims" pure and simple as, for example, where a consignee wishes to claim for the goods under the Bill of Lading, then it must be done only in Kuching, which is the port of delivery. I am, therefore, of the view that Clause 17 is not a jurisdiction clause or even a forum clause. The court should not import extra words into Clause 17 so as to give it new meaning with regard to the intention of the contracting parties. As such, the plaintiffs are entitled to file the present writ in Kuala Lumpur High Court. Even if Clause 17 can be construed as a jurisdiction or forum clause, it cannot be invoked in the present case. The carriage by sea was from Penang to Kuching. Both ports are in Malaysia. So is Port Klang where the sister ship was arrested. The High Courts in Borneo and States of Malaya have similar jurisdiction and adopt the same admiralty practice. I am inclined to the view that a jurisdiction or forum clause does not apply to a litigation commenced in another court of similar jurisdiction and situated in the same country as the court envisaged by the parties to the contract.

On the second ground, it is argued that section 3(2) of the United Kingdom Administration of Justice Act limits action *in rem* to cases mentioned in section (1)(a) to (c) and (s), and it does not apply to paragraphs (g) and h). The plaintiffs' case does not, therefore, come under section 3(4) and, as such, the present action should be *in personam*. Having considered the provisions of section 3 as contained in *Halsbury's* Statutes of England, Volume 1, 3rd Edition, I am unable to agree that section 3(2) has the effect of excluding paragraphs (g) and (h) from the rights conferred by section 3(4). No authority is cited for the proposition expounded by the defendants. Having regard to *The Permina*[3] and *The Banco*,[4] I hold that the plaintiffs' case does come within the ambit of subsection (4) of section 3 of the Act.

The defendants' application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Ranjit, Thomas & Kula; Skrine & Co.*

PUBLIC PROSECUTOR v. CHEW SIEW LUAN

[O.C.J. (Abdul Hamid F.J.) October 29, 1980]
[Kuala Lumpur — Miscellaneous Criminal Application No. 7 of 1980]

Criminal Law and Procedure — Bail — Pregnant accused — Offence under section 39B of Dangerous Drugs Act 1952 — Non-bailable — Bail allowed under Criminal Procedure Code, s. 388(i) — Dangerous Drugs Act 1952, s. 39B(2).

Bail — Pregnant accused — Criminal Procedure Code, s. 388(i).

The accused was a pregnant woman who was due for delivery on July 1, 1980. She was charged for an offence under section 39B of the Dangerous Drugs Act 1952. On June 9, 1980 the learned President granted bail pending the hearing of the case. The learned President relied on the proviso to section 388(i) of the Criminal Procedure Code which permits the granting of bail to any person under the age of 16 years, any woman, or sick or infirm person charged with non-bailable offence carrying life imprisonment or death as penalty.

The Public Prosecutor appealed.

Held, dismissing the appeal: notwithstanding the provisions contained in section 41B of the Dangerous Drugs Act, 1952, it was still within the court's discretion to grant bail in non-bailable offences punishable with death or imprisonment for life to persons covered by the proviso to section 388(i) of the Criminal Procedure Code.

[Editorial Note: See note on "Mothers in Prison" in [1979] 1 M.L.J. xci.]

CRIMINAL APPLICATION.

Hashim Yusof (Deputy Public Prosecutor) for the applicant.

K. Kumaraendran (*Sethambaram* with him) for the respondent.

Abdul Hamid F.J.: (delivering oral judgment): The Public Prosecutor has applied for the following questions of law of public interest to be reserved for determination by the Federal Court under section 66 of the Courts of Judicature Act, 1964 —

"(i) Whether or not section 388 Criminal Procedure Code overrides the provision of section 41B of the Dangerous Drugs Act 1952 (Act 234).

(ii) If the answer to question (i) above is in the negative, whether it is right in law for bail to be granted in respect of a person charged for an offence under section 39B of the Dangerous Drugs Act 1952 (Act 234)."

The questions of law are said to have arisen in the course of an appeal by the Public Prosecutor against the order of the President, Sessions Court, Penang granting bail to Chew Siew Luan (f) accused of an offence under section 39B punishable under section 39B(2) of the Dangerous Drugs Act, 1952 (Act 234). The appeal was dismissed.

The accused was charged before the Sessions Court, Penang. On June 9, 1980 the learned President granted bail pending the hearing of the case. The Public Prosecutor appealed against the order.

It is not in dispute that the accused was a woman and was medically certified to be pregnant and due for delivery on or about July 1, 1980. In granting bail the learned President relied upon the proviso to section 388(i) of the Criminal Procedure Code which permits the granting of bail to any person under the age of 16 years, any woman, or any sick or infirm person charged with non-bailable offence carrying life imprisonment or death as penalty.

I dismissed the appeal as I formed the view that, notwithstanding the provisions contained in section 41B of the Dangerous Drugs Act, 1952, it was still within the court's discretion to grant bail in non-bailable offences punishable with death or imprisonment for life to persons covered by the proviso to section 388(i) of the Criminal Procedure Code. For ease of reference I reproduce hereunder section 388(i) of the Criminal Procedure Code and its proviso and section 41B(1) and (2) of the Dangerous Drugs Act, 1952 —

"388(i) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a court, he may be released on bail by the officer in charge of the police district or by such court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

41B(1) Bail shall not be granted to an accused person charged with an offence under this Act —

(a) where the offence is punishable with death; or

(b) where the offence is punishable with imprisonment for more than five years; or

(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary."

Section 41B of the Act *inter alia* expressly prohibits the granting of bail to an accused person charged with an offence under the Act where the offence is punishable with death. Subsection (2) of section 41B provides that subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

The second limb of section 388(i) does not make provision contrary to section 41B(1) in so far as it relates to an offence punishable with death. However, there is a proviso that confers discretion to release a